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NO. 84-1228

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN THE ESTATE OF IRVY OKES ROSS,
Deceased

WANDA HOLMES, ANN JONES, JACKIE McGAHAN
and MARY DARNELL, Petitioners

VS.

EDGAR NEWTON ROSS, Independent Executor
of the Estate of IRVY OKES ROSS,
Deceased, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS ELEVENTH SUPREME JUDICIAL DISTRICT

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RESPONDENT

24pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to obtain personal service upon Petitioners (daughters of decedent who were not named as beneficiaries under his will and whose names and addresses are known) in an Application to Probate Will and Appoint Independent Executor violates the due process provision of U.S. Const. Amends. V and XIV, Section 1

2. Whether the statutory notice by posting under Tex. Prob. Code Ann. Section 128(a) (Vernon, 1980) satifies the due process provisions of U. S. Const. Amends. V and XIV, Section 1.

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NO. 84-1288

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IN THE ESTATE OF IRVY OKES ROSS,
Deceased

WANDA HOLMES, ANN JONES, JACKIE McGAHAN
and MARY DARNELL, Petitioners

VS.

EDGAR NEWTON ROSS, Independent Executor
Estate of IRVY OKES ROSS,
Deceased, Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS ELEVENTH SUPREME JUDICIAL DISTRICT

Respondent Edgar Newton Ross, Independent Executor of the Estate of Irvy Okes Ross, deceased, respectfully prays that Petitioners' Petition for a Writ of Certiorari to review the Judgment and Opinion of the Court of Appeals of Texas, Eleventh Supreme Judicial District, entered June 7, 1984, be denied.

The Opinions Delivered in Courts Below, Jurisdiction of This Court, and Constitutional Provisions and Statutes Involved in the Case are correctly set out in Petitioners' Petition For Writ of Certiorari and, therefore, are not set out herein.

STATEMENT OF THE CASE

This is an appeal from a judgment by the Court of Appeals of Texas, Eleventh Supreme Judicial District, affirming the District Court in overruling a motion for new trial and to set aside an order admitting will to probate and appointing independent executor. The Supreme Court of the State of Texas denied an Application for Writ of Error and overruled a subsequent motion for rehearing in same.

Irvy Okes Ross died on July 13, 1983, following a lengthy illness. While in the hospital Ross executed a will specifically

disinheriting his four daughters (who were not listed by name), Petitioners herein, and leaving everything to his son Edgar Newton Ross, as well as appointing his son independent executor (R Tr 6). The application to probate the will and to appoint independent executor was filed on July 14, 1983 in the County Court of Eastland County, Texas (R Tr 3). Citation was by posting (R Tr 10) at the Eastland County Courthouse as provided by Tex. Prob. Code Ann. Sec. 128(a) (Vernon 1980). None of the daughters resided in Eastland County and two were nonresidents of Texas. No other notice of the application for probate and to appoint independent executor was provided.

The County Court's order probating the will and appointing an independent executor was entered on July 28, 1983 (R Tr 14), after proper proof of the will (R Tr 12). Petitioners timely filed their motion to set aside the order and for a new trial (R Tr 21).

Upon motion of Petitioners (R Tr 45), the case was subsequently transferred to the 91st District Court of Eastland County, Texas, (R Tr 49) where a hearing was held on the motion and witnesses were called to testify (R SF). The motion was overruled by operation of law. The court made certain findings of fact and conclusions of law (R Tr 67). Petitioners requested 16 additional specific findings of fact and 4 additional conclusions of law (R Tr 70) which the court did not make. Petitioners appealed the overruling of their motion to set aside and for new trial.

Petitioners raised the issue relating to the failure to give personal notice to them and the constitutionality of such lack of personal notice in their motion for new trial and in the points of error alleged in their appeal to the Court of Appeals and the Texas Supreme Court. Their claim was denied. (see pages 12-15 of Statement of The Case in

Petitioners' Petition For Writ of Certiorari).

Petitioners seek by Writ of Certiorari review by the U. S. Supreme Court of the decision rendered in the Court of Appeals and affirmed by the Supreme Court of Texas pursuant to 28 U.S.C. § 1257 (3) of their right to due process provided in U.S. Constitution Amendments V and XIV Section 1.

Respondent would mention that there are several factual inaccuracies stated in the Statement of the Case set forth in Petitioners' petition. In regard to those factual inaccuracies relevant to the issue presented Respondent would point out the following:

(1). Finding of fact no. 8 made by the District Court (R Tr) found no misleading statements were made by Respondent to any of Petitioners (or Petitioners' spouses) regarding notification of the probate proceedings (contra to Statement of Facts pages 10,11 of Petitioners' Petition).

(2). Requested finding of fact no. 15 (discussed on page 15 of Fact Statement of Petitioners' Petition) was not made by the District Court undoubtedly because the testimony of Petitioners Wanda Holmes and Mary Darnell at the hearing on the motion to set aside indicated they were not certain whether they knew of the application to probate prior to or after the date of the hearing on the application (R SF 20-22,32).

(3). No prior will of the decedent leaving all of his estate equally to Petitioners and Respondent was admitted into evidence. A copy of an unexecuted prior will was offered into evidence, but was not admitted by the District Court (R SF 13,14).

(The abbreviations R Tr and R SF refer to the transcript portion of the record and the statement of facts portion of the record, respectively).

ARGUMENT AND AUTHORITIES FOR DENYING THE PETITION

Since both questions presented for review are analogous to each other they will be combined for the purpose of argument.

Petitioners contend that the failure to obtain personal service upon them violated the due process provision of U. S. Const. Amends. V and XIV, Section 1. They urge that statutory notice by posting under Tex.Prob. Code Ann.Secs.128(a),33(f)(2) does not satisfy the due process requirements in circumstances where the names and addresses of interested parties are known or available. Petitioners rely on the case of Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L. Ed 865,873 (1949) in which this Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested

parties of the pendency of the action and afford them an opportunity to present their objections....The notice must be of such nature as reasonably to convey the required information,...and it must afford a reasonable time for those interested to make their appearance. (Citations omitted) (Emphasis ours and Court of Appeals).

The opinion of the Texas Court of Appeals on this point is as follows:

"We recognize that various federal and Texas Courts have upheld this argument based upon the reasoning in Mullane, supra. Armstrong V. Manzo, 380 U.S. 545, 85 S.Ct.1187, 14 L.Ed. 2d 62 (1965); City of Houston v. Fore, 412 S.W.2d 36 (Tex.1967); City of Waco v. Roddey, 613 S.W.2d 360 (Tex.Civ.App. - Waco 1981, writ dism'd); Jones v. City of Odessa, 574 S.W.2d 850 (Tex.Civ.App. - El Paso 1978, writ ref'd n.r.e.); City of Houston v. Parkinson, 419 S.W.2d 900 (Tex.Civ.App. - Houston (1st Dist. 1967, writ ref'd n.r.e.). None of these cases, however, involved probate matters. Texas courts hold that posting notice of the application for probate, when a will has been produced for the court, is sufficient without giving personal notice. Ladehoff v. Ladehoff, 436 S.W.2d 334 (Tex. 1968); Nass v. Nass, 228 S.W.2d 130 (Tex.1950); Soto v. Ledezma, 529 S.W.2d 847 (Tex.Civ. App. - Corpus Christi 1975, no writ); Fortinberry v. Fortinberry, 326 S.W.2d 717 (Tex.Civ.App. - Waco 1959, writ ref'd

> n.r.e.). The order admitting the will to probate is not such a final determination of its validity as to deny appellants a remedy. Even though the burden of proof shifts to appellants, they may contest the validity of the probated will by initiating a proceeding under TEX. PROB. CODE ANN. Sec. 93 (Vernon 1980). We hold that appellee's failure to obtain personal service upon appellants does not violate the due process provisions of the federal constitution."

The above opinion of the Texas Court of Appeals emphasizes the language "in any opinion which is to be accorded finality". Petitioners contend that the Court of Appeals is erroneously saying that the subject order of the probate court admitting the will to probate and appointing an independent executor is not a final judgment. Such contention is incorrect. The Court of Appeals is saying that such an order is not a final determination of its validity as to deny petitioners a remedy (emphasis ours), and that Petitioners may contest the validity of the probated will by instituting a proceeding under Tex. Prob. Code Ann.Sec.93. Petitioners further contend that the

decision of Armstrong v. Manzo, 380 U.S.545 (1965) is analogous to the present case. As noted, Armstrong is not a probate proceeding. Also, the remedy afforded Petitioners under Section 93 is different from the remedy (motion for new trial hearing to contest the judgment) provided in Armstrong. Such remedy under Section 93 is a new and independent proceeding.

Respondent would cite the following decisions of this court which have considered probate notice provisions similar to the Texas provisions and found them to be constitutional:

(1). Case of Broderick's Will 88 U.S. (21 Wall) 503 (1874). This was a suit by heirs at law to set aside the probate of a will alleged to be a forgery and involving a California statute that provided for notice by publication or posting with a one year period to contest the probate. Justice Bradley noted that the succession to a

deceased person's estate is in the nature of a proceeding in rem, in which all persons in the world who have any interest are deemed parties; that the public interest requires that estates of deceased persons, being deprived of a master and subject to all manner of claims, should at once evolve to a new and competent ownership; that there should be some convenient jurisdiction and made of proceeding by which this devolution may be perfected with the least chance of injustice and fraud; and that the result obtained should be firm and perpetual. After reviewing the California statute, Justice Bradley stated:

> "In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth."

(2). Farrell v. O'Brien 199 US 89 (1905). This case involved heirs at law seeking to set aside a nuncupative will and a Washington statute which provided for no notice, but a

one year period during which a will could be contested. Justice White stated:

> "The contention made on this subject amounts to asserting that every state law which provides for probate of a common form is repugnant to the due process clause of the constitution even though under state statutes full and adequate remedies are provided by which interested parties during a period of time prescribed by law, be heard in the probate proceedings to ascertain the existence of a will or its probate."

(3). Culbertson v. H. Witbeck Co. 127 US 326 (1888). In this case the court approved notice by publication noting that unless the necessary parties in such cases could be brought before the court by publication there would be in many cases an impossibility of doing it at all.

(4). Robertson v. Pickrell 109 US 608 (1883). A Virginia statute allowing probate immediately upon filing of proof and providing for a seven year period to contest in chancery by any interested persons was held to be constitutional.

(5). Goodrich v. Ferris 214 US 71 (1909). A California statute providing for 10 days statutory notice of the time appointed for the settlement of the final account and upon action for final distribution was found to be constitutional and not wanting in due process.

(6). Christianson v. King County 239 US 356 (1915).

(7). Michigan Trust Co. v. Ferry 228 US 346 (1913).

Respondent would emphasize (as noted in several of the above cited cases) that probate is an in rem proceeding directed against property rather than persons. Its purpose is to determine the interests of all persons, know or unknown, in the res, and a valid judgment in rem is considered binding on the whole world. The Texas Court of Appeals in its opinion noted as follows:

> "Probate proceedings are actions in rem and bind all persons unless set aside in the manner provided by

law. TEX. PROB. CODE ANN. Sec. 2(e) (Vernon 1980), Mooney v. Harlin, 622 S.W.2d 83 (Tex.,1981), Soto v. Ledezma, 529 S.W.2d 847 (Tex.Civ.App.-Corpus Christi, 1975, no writ). See TEX. PROB. CODE ANN. Sec. 93 (Vernon, 1980). Persons interested in an estate are charged with notice of the contents of the probate records. Mooney v. Harlin, Supra; Salas v. Mundy 125 S.W.633 (Tex.Civ.App. 1910, writ ref'd.)"

The Court in Mullane stated that distinctions between actions in rem and those in personam were useful in many branches of the law in determining the power of the State to resort to constructive service and emphasized that its holding was confined only to that particular proceeding (notice of judicial settlement of accounts required by the New York Banking Law). In Mullane the interested parties had an actual vested interest in accounts. In our present case the Petitioners never had an interest in the decedent's estate as they were not named as beneficiaries in his will.

Another argument against the use of

Mullane in probate can be made from the course of development of American probate law from its English heritage. Probate jurisdiction in early England was in ecclesiastical courts with no notice being given of the probate of a will; however, English law did provide a period in which interested parties could come in and contest the probate. Some states still adhere to this basic no notice system, and other states have modified the system to at least provide for statutory notice by publication, prior to the probate of the will. Thus, the system of notice by publication or posting has always been part of our probate system. Page, The Law of Wills, Revised Treatise, Vol. 8, pages 23,26,86,87.

The statutory notice by posting under Tex. Prob. Code Ann. Section 128(a) of the application to probate a will and appoint executor satisfies the due process provision of U. S. Court. Amends. V and XIV, Section 1.

There is no question but that the statutory requirements have been fully complied with and there is no finding of any type of fraud or other illegality on the part of the Respondent. Petitioners knew of decedent's death and the fact that they did not reside in the county of probate and know of the posting of the notice is their only excuse offered. Justice Bradley writing of the analogous circumatences in the Case of Broderick's Will noted that if such an excuse could prevail it would unsettle all proceedings in rem. The failure to obtain personal service upon Petitioners did not constitute a violation of due process.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENT

March, 1985

CERTIFICATE OF SERVICE

I do hereby certify that three copies of the foregoing Respondent's Brief In Opposition To Petitioners' Petition For A Writ of Certiorari To The Court Of Appeals of Texas Eleventh Supreme Judicial District were forwarded to Brian E. Cutbirth of Whitten, Haag, Hacker, Hagin & Cutbirth, P. O. Box 208, Abilene, Texas 79604, by certified mail, return receipt requested, on this the 13th day of March, 1985.

Tommy Warford

Tommy Warford